

2004

# Tom Heal Commercial Real Estate, Inc. v. Glen Overton and Zions Holding Company, L.C. : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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TOM HEAL COMMERCIAL REAL  
ESTATE, INC.,

Plaintiff / Appellant,

v.

GLEN OVERTON and ZIONS  
HOLDING COMPANY, L.C.,

Defendants / Appellees.

Appellate Court No. 20040519

**UTAH COURT OF APPEALS  
BRIEF**

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**BRIEF OF APPELLANT**

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APPEAL FROM THE FOURTH DISTRICT COURT, UTAH COUNTY, UTAH, THE  
HONORABLE DEREK P. PULLEN PRESIDING

---

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**ORAL ARGUMENT REQUESTED**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	3
APPELLATE JURISDICTION .....	5
ISSUES PRESENTED ON APPEAL .....	5
DETERMINATIVE LAW .....	7
STATEMENT OF THE CASE .....	8
STATEMENT OF FACTS .....	10
SUMMARY OF ARGUMENT .....	13
ARGUMENT .....	14
I.    The Plain Meaning of the Listing Agreement Provides for a Commission to be Paid to Heal for any and all Lease Renewals .....	14
A.    The Plain Meaning of the Listing Agreement Controls ...	14
B.    The District Court’s Interpretation of the Protection Period Is Not Consistent with the Industry-wide Purpose of Protection Periods .....	20
1.    The Protection Period Exists to Protect the Broker, Not to Limit the Duration of the Responsibilities Created Under the Listing Agreement .....	20
C.    Commissions on lease renewals are commonly negotiated and paid by Landlords/Sellers to Brokers .....	23
II.   If this Court Reverses the District Court’s Holding, Heal is Entitled to an Award of Attorney Fees for Services Rendered Before the District Court and Before this Court. ....	25
A.    Attorney Fees Are Available Under the Listing Agreement	25
B.    A Provision for Payment of Attorneys’ Fees in a Contract Includes Attorneys’ Fees Incurred by a Prevailing Party on Appeal as Well as at Trial .....	25
CONCLUSION .....	26
ADDENDUM and CERTIFICATE OF SERVICE .....	27

## TABLE OF AUTHORITIES

### CASES

<i>Amerus Property Brokers v. Hicklin</i> , 585 N.W.2d 245 (Iowa 1998) .....	24
<i>Biesinger v. Behunin</i> , Utah 584 P.2d 801(1978) .....	18
<i>Dejavue, Inc. v. U.S. Energy Corp.</i> , 993 P.2d 222, 383 Utah Adv. Rep. 9, 1999 UT App 355(Utah App. 1999) .....	17, 26
<i>Hal Taylor Associates v. Unionamerica, Inc.</i> , 657 P.2d 743, 749 (Utah 1982) ....	16, 18
<i>Jones v. ERA Brokers Consolidated</i> , 6 P.3d 1129, 1132, 401 Utah Adv.Rep. 8, 2000 UT 61 (Utah 2000) .....	18, 19
<i>Keith Jorgensen's, Inc. v. Ogden City Mall Co.</i> , 26 P.3d 872, 876, 419 Utah Adv. Rep. 26, 2001 UT App 128 (Utah App.2001) .....	17, 26
<i>Management Services Corp., v. Development Associates</i> , 617 P.2d 406, 409 (Utah 1980) .....	8, 25
<i>Provo City Corp. v. Nielson Scott Co., Inc.</i> , 603 P.2d 803, 806 (Utah 1979) .....	19
<i>Realty World Labrum v. Steadman</i> , 737 P.2d 165, 167 (Utah 1987) .....	21
<i>Sackler v. Savin</i> , 897 P.2d 1217, 1220 (Utah 1995) .....	7, 15
<i>Swain v. Salt Lake Real Estate &amp; Investment Co.</i> , 3 Utah 2d 121, 279 P.2d 709(Utah 1955)(overruled by <i>Management Service Corp</i> , 617 P.2d 406(Utah 1980)). .....	25
<i>Utah State Medical Association v. Utah State Employees Credit Union</i> , 655 P.2d 643, 646 (Utah 1982) .....	16
<i>Zaniewski v. Mancinone</i> , 37 Conn.Supp. 698, 435 A.2d 50, 51 (Conn.Super.App. 1981) .....	21
<i>Zions First Nat'l Bank v. National Am. Title Ins. Co.</i> , 749 P.2d 651, 653 (Utah 1988) .....	7, 15

**STATUTES AND RULES**

Utah Code Ann. § 78-2a-3(2) ..... 5

Utah Code Ann. § 78-2-2(4) ..... 5

Utah Code Ann. § 78-27-56.5 ..... 7, 10

Utah Rules of Appellate Procedure 34 ..... 8

Utah Rules of Civil Procedure Rule 54(b) ..... 9, 10

Utah Rules of Civil Procedure Rule 56 ..... 10

## APPELLATE JURISDICTION

Utah Code Ann. § 78-2a-3(2)(j) gives this court jurisdiction pursuant to the Order of the Supreme Court of the State of Utah dated June 22, 2004, transferring this case from the Supreme Court to the Utah Court of Appeals pursuant to Section 78-2-2(4), Utah Code Annotated.

## ISSUES PRESENTED ON APPEAL

1. **Contract Interpretation.** At issue before this Court is the interpretation of two paragraphs of a “LISTING AGREEMENT AND AGENCY DISCLOSURE,” (hereinafter the “Listing Agreement”) entered into between Tom Heal Commercial Real Estate, Inc. (hereinafter “Heal” or “Broker”) and Glen Overton /and his Interests.<sup>1</sup> The

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<sup>1</sup> The two disputed paragraphs of the Listing Agreement are as follows:

2. **BROKERAGE FEE.** If, during the Listing Period, the Company, the Seller’s Agent, The Seller, another real estate agent, or anyone else locates a party who is ready, willing and able to buy, lease, or exchange (collectively referred to as “acquire”) the Property, or any part thereof, at the listing price and terms stated on the attached property data information form, or any other price and terms to which the Seller may agree in writing, the Seller agrees to pay to the Company a brokerage fee in the amount of six percent (6%) of such acquisition price. In the case of a lease of the Property, the commission shall be the commission percentage times the aggregate of all lease payments during the full term of the lease. Seller shall be obligated to pay a commission on [sic] of six percent (6%) on any and all lease renewals at the time of such renewals. The brokerage fee, unless otherwise agreed in writing by the Seller and the Company, shall be due and payable on (a) the date of closing of the acquisition of the Property; or (b) 50% due and payable when the lease is signed, and 50% due and payable upon the first day of the lease commencement; or (c) the first day of the lease renewal commencement; or (d) the date the option is signed.

3. **Protection Period.** If within twenty-four months after the termination or expiration of this Listing Agreement, the Property is acquired by a party to whom the Property was offered or shown by the Company, the Seller’s Agent, the Seller, another real estate agent, or by any other person during

district court found that Zion's Holding Company, L.C. (hereinafter "Zions") ratified the contract by paying the initial commission due to Heal for finding a buyer/lessee for the property. Findings of Fact and Conclusions of Law, Conclusions of Law ¶ 1. As seen in footnote one, the two disputed paragraphs provide guidelines for payment of brokerage fees and establish a protection period of twenty-four months (hereinafter "Protection Period"). Heal asserts Zions must pay Heal a brokerage fee on any and all lease renewals. Zions asserts the Protection Period limited its responsibility to pay brokerage fees. However, as explained in the amicus brief filed by the Utah Association of Realtors and the National Association of Realtors (hereinafter "Amicus Brief"), the protection period exists to prevent fraud by the seller and/or buyer; the protection period does not exist to limit the payment of commissions.<sup>2</sup> Nonetheless, the district court determined that the Protection Period paragraph, when read in harmony with the brokerage fee paragraph, limited the time for which lease renewal brokerage fees were due to Heal. **Thus, the first issue before this Court is whether the district court erred when it found that a commission is payable by Zions to Heal for a lease renewal only if the renewal arises within the Protection Period, where the Listing Agreement plainly states, "Seller shall be obligated to pay a commission . . . of six percent (6%)**

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the Listing Period, the Seller agrees to pay to the Company the brokerage fee stated in Section 2 unless the Seller is obligated to pay a brokerage fee on such acquisition to another brokerage pursuant to another valid listing contract entered into after the expiration or termination date of this Listing Agreement.

<sup>2</sup> The purpose of the protection period, as discussed in the Amicus Brief filed by the Utah Association of Realtors and the National Association of Realtors is to Prohibit the seller from avoiding the payment of the broker's commission by 1) meeting the ready and willing buyer provided by the broker, 2) waiting for the expiration of the listing period, and 3) selling or leasing the property to the buyer after the expiration of the listing period in order to avoid the obligation to pay the commission to the broker. See Amicus Brief, Protection Period paragraph p. 7.



**on any and all lease renewals at the time of such renewals.”**

*a. Standard of review:* Interpretation of a contract is a question of law that this court reviews for correctness, and on such questions the appellate court accords the district court’s interpretation “no presumption of correctness.” *Sackler v. Savin*, 897 P.2d 1217, 1220 (Utah 1995)(quoting *Zions First Nat’l Bank v. National Am. Title Ins. Co.*, 749 P.2d 651, 653 (Utah 1988)).

*b. Citation to the record:* Complaint ¶16.

**2. Attorneys’ fees.** If the district court is reversed is Zions entitled to attorneys’ fees? Additionally, if the district court is reversed, is Heal entitled to its attorneys’ fees?

*a. Standard of review:* The district court's granting of attorney fees to a party is a question of law reviewed for correctness. *Keith Jorgensen's, Inc. v. Ogden City Mall Co.*, 26 P.3d 872, 876 (Utah App.2001)(citing *Dejavue, Inc. v. U.S. Energy Corp.*, 993 P.2d 222(Utah App. 1999)).

*b. Citation to the Record:* Complaint ¶ 21.

## **DETERMINATIVE LAW**

### **1. Contract Interpretation**

-*Sackler v. Savin*, 897 P.2d 1217, 1220 (Utah 1995).

-*Zions First Nat’l Bank v. National Am. Title Ins. Co.*, 749 P.2d 651, 653 (Utah 1988).

### **2. Attorneys’ fees**

-Utah Code Ann. § 78-27-56.5 ( stating “[a] court may award costs and attorney’s fees to either party that prevails in a civil action based upon any promissory note

written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney's fees.")

-Rule 34(a) of the Utah Rules of Appellate Procedure (authorizing the appellate court to award fees and costs to the prevailing party)

-*Management Services Corp., v. Development Associates*, 617 P.2d 406, 409 (Utah 1980)(stating "a provision for payment of attorney's fees in a contract includes attorney's fees incurred by the prevailing party on appeal as well as at trial . . .").

### **STATEMENT OF THE CASE**

*Nature of the case:* The underlying case involves a contract dispute concerning realtor/broker commissions.

*Course of Proceedings:* Heal filed a complaint against Zions and Glen Overton alleging breach of contract, unjust enrichment, quantum meruit and breach of implied contract of good faith and fair dealing. Defendant Glen Overton was residing in Australia at the commencement of the suit. Heal filed a Motion to Serve Complaint and Summons on Defendant Overton Pursuant to Rule 4(d)(3)(C) on November 5, 2003. Meanwhile, on October 7, 2003 Zions filed a Motion to Dismiss as to Defendant Zion's Holding Company. On Friday December 12, 2003 the above two Motions were heard by the district court. Zions prevailed on its Motion to Dismiss and Heal prevailed on its Motion to Serve Complaint and Summons on Defendant Overton Pursuant to Rule 4(d)(3)(C). In

relation to the Motion to Dismiss, Heal asserted that pursuant to the Listing Agreement Zions must pay Heal a brokerage fee on any and all lease renewals. A lease renewal occurred in this case because the tenant Heal located pursuant to the Listing Agreement, who had signed a lease with Zions on or about July 30, 1999, renewed the lease with Zions on or about April 15, 2003 for a period of two years. Zions asserts that the Protection Period limits its responsibility to pay brokerage fees under the Listing Agreement.<sup>3</sup> On April 22, 2004 the district court conducted oral argument on the Fee Affidavit and Fee Objection related to the above motions and hearings. On May 5, 2004 the district court conducted a telephone conference between the parties related to entering findings of fact and conclusions of law related to the above proceedings and entering a final judgment as to Zions pursuant to Utah Rules of Civil Procedure Rule 54(b).

*Disposition below:* The district court found that notwithstanding the fact that the Agreement identifies “Glen Overton/AND HIS INTERESTS” as the “Seller” the [Listing] Agreement was implicitly ratified by Zions by virtue of Zions’ payment to Heal of the original commission associated with the execution of the lease between Zions and a third party tenant located by Heal. Findings of Fact and Conclusions of Law, Conclusions of Law ¶ 1. The district court granted Heal’s motion to serve summons and

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<sup>3</sup>As is plainly explained in Amicus Brief filed by the Utah Association of Realtors and the National Association of Realtors as outlined in footnote 2, protection periods exist to prevent fraud by the seller and/or buyer. Protection periods do not exist to limit the payment of commissions. Amicus Brief, pgs. 5, 7 and 8.

complaint on Overton pursuant to Rule 4(d)(3)(C). After considering matters outside the pleadings, the district court treated Zions' Motion to Dismiss as a motion for summary judgment under Rule 56 of the Utah Rules of Civil Procedure. The district court concluded that a commission on a lease renewal "is only due and owing if it arises within the [P]rotection [P]eriod specified in the [Listing]Agreement pursuant to a lease renewal." Findings of Fact and Conclusions of Law, Conclusions of Law ¶ 7.

Furthermore, the district court concluded that the Listing Agreement "does not provide for a commission payment in perpetuity on any lease renewal." Findings of Fact and Conclusions of Law, Conclusions of Law ¶ 7. The district court further certified its decision as it relates to Zions' Motion to Dismiss and the district court's interpretation of the Listing Agreement pursuant to Utah Rules of Civil Procedure Rule 54(b). The district court granted Zions fees and costs in the amount of \$8,270.50 based on the language of the Listing Agreement allowing the collection of attorneys' fees (the district court relied on UCA 78-27-56.5 to apply the attorneys' fee clause of the contract to both parties).

Heal appeals: 1) the district court's findings related to liability for lease renewals under the Listing Agreement; 2) for a reversal of the grant of attorneys' fees; and 3) for an award of Heal's reasonably incurred attorneys' fees, or instructions to the lower court to determine Heal's reasonable attorney's fees in prosecuting this matter in front of both the district court and the appellate court.

## **STATEMENT OF FACTS**

1. Zions is a Utah limited liability company, separate and distinct from its members and validly formed on or about February 2, 1997. Findings of Fact and Conclusions of Law, Findings of Fact ¶ 1.

2. On or about June 30, 1999, Heal prepared and Glen Overton/ and his interests” executed a Listing Agreement, a copy of which is attached to the Findings of Fact and Conclusions of Law as Exhibit A. Findings of Fact and Conclusions of Law, Findings of Fact ¶ 2.

3. The Listing Agreement identifies “the Seller” as “Glen Overton/and his interests.” Findings of Fact and Conclusions of Law, Findings of Fact ¶ 3.

4. The district court found that regardless of the party listed as the Seller, the Listing Agreement was implicitly ratified by Zions when Zions paid Heal the commission associated with the execution of the initial lease between Zions and a tenant found by Heal. Findings of Fact and Conclusions of Law, Conclusions of Law ¶ 1.

5. The Listing Agreement provides for a listing period beginning June 23, 1999 and ending on September 23, 1999. (Hereinafter “the Listing Period”). Findings of Fact and Conclusions of Law, Findings of Fact ¶ 4.

6. Paragraph 2 of the Listing Agreement mandates the payment of commissions to Heal by Zions for “any and all lease renewals.” Findings of Fact and Conclusions of Law, Findings of Fact ¶ 5.

7. Paragraph 2 of the Listing Agreement specifically states:

**BROKERAGE FEE.** If, during the Listing Period, the Company, the Seller's Agent, The Seller, another real estate agent, or anyone else locates a party who is ready, willing and able to buy, lease, or exchange (collectively referred to as "acquire") the Property, or any part thereof, at the listing price and terms stated on the attached property data information form, or any other price and terms to which the Seller may agree in writing, the Seller agrees to pay to the Company a brokerage fee in the amount of six percent (6%) of such acquisition price. In the case of a lease of the Property, the commission shall be the commission percentage times the aggregate of all lease payments during the full term of the lease. Seller shall be obligated to pay a commission on [sic] of six percent (6%) on any and all lease renewals at the time of such renewals. The brokerage fee, unless otherwise agreed in writing by the Seller and the Company, shall be due and payable on (a) the date of closing of the acquisition of the Property; or (b) c50% due and payable when the lease is signed, and 50% due and payable upon the first day of the lease commencement; or (c) the first day of the lease renewal commencement; or (d) the date the option is signed.

Listing Agreement Paragraph 2.

8. Paragraph 3 in the Listing Agreement provides for a Protection Period to Heal under the Listing Agreement for a period of twenty-four months following the expiration of the Listing Agreement. The Protection Period ran through September 23, 2001.

Findings of Fact and Conclusions of Law, Findings of Fact ¶ 6.<sup>4</sup>

9. On or about July 30, 1999, well within the Listing Period, Heal provided Zions with a tenant for an initial three (3) year period which extended through August 1, 2002.

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<sup>4</sup> As noted above and in the Amicus Brief, the purpose of a protection period is to prohibit the seller from avoiding the payment of the broker's commission by 1) meeting the ready and willing buyer provided by the broker, 2) waiting for the expiration of the listing period, and 3) selling or leasing the property to the buyer after the expiration of the listing period in order to avoid the obligation to pay the commission to the broker. See supra footnote 1 and Amicus Brief, Protection Period paragraph, p.7.

Findings of Fact and Conclusions of Law, Findings of Fact ¶ 7.

10. On April 15, 2003, Zions renewed its lease agreement with the tenant found by Heal for a period of two (2) years. (hereinafter “Lease Renewal”) Findings of Fact and Conclusions of Law, Conclusions of Law ¶ 2.

11. Heal demanded a commission from Zions for the Lease Renewal and Zions refused to pay said commission on the basis that the Lease Renewal was consummated outside of the expiration of the Protection Period. See Reply Memorandum to Plaintiff’s Response to Zion’s Holding Company, L.C.’s Motion to Dismiss, p.4.

12. Paragraph 7 of the Listing Agreement provides that the prevailing party in a lawsuit shall be entitled to an award of attorneys’ fees incurred to prosecute or defend any rights under the contract. Listing Agreement Paragraph 7.

### **SUMMARY OF ARGUMENT**

#### **1. Pursuant to the Terms of the Listing Agreement the Commission for the Lease Renewal Should be Paid to Heal.**

The district court erred in concluding that the Listing Agreement precludes the payment of commissions on the Lease Renewal unless such Lease Renewal occurred during the Protection Period. Such a ruling is in direct contravention of the express terms of the Listing Agreement. Furthermore, the Protection Period does not exist to govern the payment of commissions on lease renewals but instead exists to protect brokers from

possible fraud by sellers and buyers.<sup>5</sup> Finally, commissions on lease renewals are commonly paid to brokers to award them for the economic benefit created for the seller/lessor. See Amicus Brief, “the Perpetuity Argument” paragraph, p. 8-9.

**2. The Attorneys’ Fees Granted to Zions by the District Court Should be Disallowed and Heal Should be Awarded its Reasonable Attorneys’ Fees.**

The Listing Agreement entitles the prevailing party to recover its attorneys’ fees. In the event this Court overturns the district court’s order, Zions will no longer be the prevailing party and therefore will not be entitled to attorneys’ fees pursuant to the Listing Agreement. Furthermore, where a contract provides attorneys’ fees for the prevailing party, caselaw supports granting the prevailing party on appeal its fees and costs for both the district court and prosecuting the appeal. In the event this Court overturns the lower court and finds in favor of Heal, Heal is entitled to its reasonable fees and costs and the matter should be remanded to the lower court for the sole purpose of determining Heal’s reasonable attorneys’ fees and costs.

**ARGUMENT**

**I. The Plain Meaning of the Listing Agreement Provides for a Commission to be Paid to Heal for any and all Lease Renewals.**

**A. The Plain Meaning of the Listing Agreement Controls**

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<sup>5</sup>See supra footnote 2 citing the Utah Association of Realtors and National Association of Realtors Amicus Brief.



On appeal, the district court's interpretation of a contract is a question of law that this Court reviews for correctness, and on such questions the appellate court accords the district court's interpretation "no presumption of correctness." *Sackler v. Savin*, 897 P.2d 1217, 1220 (Utah 1995)(quoting *Zions First Nat'l Bank v. National Am. Title Ins. Co.*, 749 P.2d 651, 653 (Utah 1988)). At issue before this Court is the interpretation of paragraphs 2 and 3 of the Listing Agreement which provide as follows:

**2. Brokerage Fee.** If, during the Listing Period, the Company, the Seller's Agent, The Seller, another real estate agent, or anyone else locates a party who is ready, willing and able to buy, lease, or exchange (collectively referred to as "acquire") the Property, or any part thereof, at the listing price and terms stated on the attached property data information form, or any other price and terms to which the Seller may agree in writing, the Seller agrees to pay to the Company a brokerage fee in the amount of six percent (6%) of such acquisition price. In the case of a lease of the Property, the commission shall be the commission percentage times the aggregate of all lease payments during the full term of the lease. Seller shall be obligated to pay a commission on [sic] of six percent (6%) on any and all lease renewals at the time of such renewals. The brokerage fee, unless otherwise agreed in writing by the Seller and the Company, shall be due and payable on (a) the date of closing of the acquisition of the Property; or (b) 50% due and payable when the lease is signed, and 50% due and payable upon the first day of the lease commencement; or (c) the first day of the lease renewal commencement; or (d) the date the option is signed. The Company is authorized to share the brokerage fee with another brokerage participating in any transaction arising out of this Listing Agreement.

**3. Protection Period.** If within twenty-four months after the termination or expiration of this Listing Agreement, the Property is acquired by a party to whom the Property was offered or shown by the Company, the Seller's Agent, the Seller, another real estate agent, or by any other person during the Listing Period, the Seller agrees to pay to the Company the brokerage fee stated in Section 2 unless the Seller is obligated to pay a brokerage fee on such acquisition to another brokerage pursuant to another valid listing contract entered into after the expiration or termination date of this Listing Agreement.

Listing Agreement Paragraphs 2 and 3. In relation to the above two paragraphs, the district court concluded that a commission on the Lease Renewal “is only due and owing if it arises within the [P]rotection [P]eriod specified in the [Listing] Agreement pursuant to a lease renewal.” Findings of Fact and Conclusions of Law, Conclusions of Law ¶ 7. Furthermore, the district court concluded that the Listing Agreement “does not provide for a commission payment in perpetuity on any lease renewal.” Findings of Fact and Conclusions of Law, Conclusions of Law ¶ 7. The above two conclusions of law are in error and are inconsistent with the clear meaning and unambiguous language of the contract.

When examining a contract the primary source of inquiry is the contract itself, “considered in its entirety.” *Hal Taylor Associates v. UnionAmerica, Inc.*, 657 P.2d 743, 749 (Utah 1982)(citations omitted). Not only should the contract be considered in its entirety, but the agreement as a whole should be examined given “the circumstances, nature and purpose of the contract.” *Utah State Medical Association v. Utah State Employees Credit Union*, 655 P.2d 643, 646 (Utah 1982)(citations omitted). The circumstances, nature and purpose of this Listing Agreement were simply that the defendants owned an office building located at 1500 North 150 West, Provo, Utah, and needed tenants to occupy the building. The Listing Agreement made Heal the “authorized” agent to list the property during the Listing Period. Simply put, if Heal found a tenant, ready, willing and able, within the 90 day Listing Period it was entitled to

the commissions provided for in the Listing Agreement; if Heal did not find a tenant, no commissions would be due. Thus, one of the main purposes of the Listing Agreement was to provide guidelines for the payment of commission for services rendered under the Listing Agreement, including commissions for finding a tenant and commissions on all lease renewals entered into by that tenant during or after the Protection Period.

Lease renewals and the brokerage fees associated with them are specifically addressed in Paragraph 2 of the Listing Agreement; Paragraph 2 also addresses brokerage fees due for the initial sale or lease of the property. The first sentence of Paragraph 2 outlines the commission to be paid if a ready and willing buyer is found during the Listing Period. The third sentence of Paragraph 2 addresses the commission (or brokerage fee) for “any and all lease renewals,” commissions separate from the commission for initially selling or leasing the property. Because the Lease Renewal commission is a new and separate commission from the initial brokerage fee for selling or leasing the property, the timing of its payment is not governed by the time period controlling the initial brokerage fee but is governed by the clear language found at the latter end of Paragraph 2.

Paragraph 2 of the Listing Agreement clearly states that commissions for lease renewals are due “the first day of the lease renewal commencement.” Thus, the closing sentences of the brokerage fee paragraph of the Listing Agreement, set the time period for paying the lease renewal commissions, not the Protection Period paragraph. Furthermore, paragraph 3 of the Listing Agreement clearly mandates the payment of a brokerage fee, if

the property is acquired by a party located by the Broker during the Listing Period. There is no mention in paragraph three of any limitations placed on the payment of commissions for lease renewals.

The district court's interpretation erroneously limits the commissions due on lease renewals to lease renewals entered into during the Protection Period. Such an interpretation ignores the plain meaning of the following sentence: "Seller shall be obligated to pay a commission on [sic] of six percent (6%) on any and all lease renewals at the time of such renewals." Listing Agreement Paragraph 2. The district court's decision also ignores option (c) of paragraph 2 which plainly provides for the payment of commissions for lease renewals on "the first day of the lease renewal commencement." The district court states that "the agreement does not provide for a commission payment in perpetuity on any lease renewal." Such a conclusion rewrites the contract. Furthermore such an interpretation flies in the face of a long-standing rule in Utah "that persons dealing at arm's length are entitled to contract on their own terms without the intervention of the courts to relieve either party from the effects of a bad bargain." *Hal Taylor Associates v Unionamerica, Inc.*, 657 P.2d 743, 749(Utah 1982)(citing *Biesinger v. Behunin*, Utah 584 P.2d 801(1978). The parties have contracted for their rights and the Listing Agreement plainly states that a commission is due on "any and all lease renewals." The district court cannot go back, rewrite the agreement and place a time limit on Zions' obligation to pay the commissions on lease renewals. See *Jones v. ERA*

*Brokers Consolidated*, 6 P.3d 1129, 1132 (Utah 2000)(citing *Provo City Corp. v. Nielson Scott Co.*, 603 P.2d 803, 806 (Utah 1979) (holding that a court cannot rewrite an unambiguous contract)). The Listing Agreement sets the time for payment of the lease renewal commission as the “first day” of the lease renewal period clearly indicating that Zions’ obligation to pay the lease renewal commissions continue so long as the lease is renewed.

The district court’s interpretation of the Listing Agreement makes the lease renewal language superfluous because the original lease was for three years, one year longer than the Protection Period and therefore any lease renewal would have fallen outside of the Protection Period and therefore outside of the scope of the contract. The district court made the following conclusion of law in explanation of its decision:

There is no ambiguity in the Agreement inasmuch as paragraph three (3) in the Agreement specifically references paragraph two (2). When those provisions are harmonized together, not read in isolation to one another as Heal asserts, it is clear that a commission is payable by Zion’s to Heal pursuant to the lease renewal only if it arises within the protection period which it does not.

Findings of Fact and Conclusions of Law and Order, Conclusion of Law ¶5. The district court’s holding and reasoning is illogical. Under the district court’s interpretation of the Listing Agreement, if parties to a listing agreement wanted to include commissions for lease renewals in their contract they would need to include a protection period of unlimited duration because the lease renewals could go on indefinitely. Given the reason for having a protection period, described below and in the Amicus Brief, a protection

period of unlimited duration would be unreasonable. The Protection Period in the Listing Agreement is set for two years for the purpose of protecting the Broker's rights related to ready, able and willing buyers that the Broker contacted during the Listing Period but who sign an initial lease agreement or sales agreement after the expiration of the Listing Period, but during the Protection Period. The duration of the Protection Period is a reasonable length of time to protect against unscrupulous buyers and sellers and is a separate concept from the payment of commissions for lease renewals.

**B. The District Court's Interpretation of the Protection Period Is Not Consistent with the Industry-wide Purpose of Protection Periods**

The district court concluded that a commission on a lease renewal "is only due and owing if it arises within the [P]rotection [P]eriod specified in the [Listing] Agreement pursuant to a lease renewal." Findings of Fact and Conclusions of Law, Conclusions of Law ¶ 7. Furthermore, the district court concluded that the Listing Agreement "does not provide for a commission payment in perpetuity on any lease renewal." Findings of Fact and Conclusions of Law, Conclusions of Law ¶ 7. The above two conclusions of law are in error and inconsistent with the clear meaning of the Listing Agreement as explained above, and contradict the industry wide meaning of a protection period explained below.

**1. The Protection Period Exists to Protect the Broker, Not to Limit the Duration of the Responsibilities Created Under the Listing Agreement**

One of the fundamentals of real estate law is "that a broker is entitled to his

commission if he has procured a customer ready, willing and able to buy on terms prescribed or agreed upon by the seller.” *Zaniewski v. Mancinone*, 435 A.2d 50, 51 (Conn. 1981)(citations omitted). The above tenet provides that a commission is due if the broker’s purchaser is ready, willing and able. This tenet does not require the consummation of the contract, between the seller and the customer, during the listing period. The reason for this is because most, if not all listing agreements have an agreed upon “protection period.” The purpose of the protection period, in either a commercial or residential sale is to prohibit the seller from avoiding the payment of the broker’s commission by 1) meeting the ready and willing buyer provided by the broker, 2) waiting for the expiration of the listing period, and 3) selling or leasing the property to the buyer after the expiration of the listing period in order to avoid the obligation to pay the commission to the broker. *See Realty World Labrum v. Steadman*, 737 P.2d 165, 167 (Utah 1987); See also Amicus Brief, Protection Period paragraph, p.8-9. Simply put, in the real estate industry, the protection period exists to protect brokers from potential fraudulent activity by the buyer and/or seller and is completely unrelated to the obligation to pay a commission on a lease renewal. See Amicus Brief, Protection Period paragraph, p.8-9.

The Listing Agreement between Heal and Zions created a 24-month Protection Period beginning after the expiration of the Listing Period. Under the Listing Agreement, if Heal found a ready, willing and able buyer or tenant within the Listing Period and that

buyer/tenant leased the property during either the Listing Period or the 24 months after the Listing Period's expiration, the Protection Period, then a commission was due Heal. Thus, the Protection Period protects Heal and allows it to benefit from its work in finding a ready, willing and able buyer during the Listing Period. If said buyer buys or leases the property during the Protection Period. Heal's benefit is a brokerage commission which in this and most listing agreements is paid as a percentage of the economic benefit given to the seller from the broker's work.

In the case at bar the district court erroneously applied the Protection Period to limit Zions' responsibility to pay commissions on lease renewals. As is made abundantly clear in the Amicus Brief filed by the Utah Association of Realtors and the National Association of Realtors, such is not the purpose of the Protection Period. The two Associations state as follows:

For the lower court to rule that the Protection Period applied in a way so as to prohibit real estate professional from receiving a commission upon lease renewal is contrary to the common and essentially universal understanding of the meaning of a listing agreement protection period provision. Simply put, that is not the intent of incorporating a protection period into a valid and enforceable listing agreement. If this Court were to affirm and perpetuate the District Court's decision, the real estate industry as a whole will be negatively impacted, and there will be considerable confusion between the significance of Protection Periods in Utah as compared with the completely different understanding of such language in the balance of the country.

Amicus Brief, Protection Period paragraph, p. 8. Furthermore, the district court's holding eliminates any and all commissions for lease renewals. Therefore, the seller gets the full



economic benefit of the broker's work without the responsibility of paying the commission. Such a result is not consistent with the language of the Listing Agreement and applies the Protection Period inconsistent with its true purpose.

The purpose of the Protection Period in this Listing Agreement is consistent with protection periods provided in standard listing agreements in the industry. Given the industry-wide purpose of protection periods and the unambiguous meaning of the contract outlined above, the district court's application of the Protection Period to limit the duration of the contract as it relates to lease renewals is clearly erroneous. Thus, the district court's interpretation of the contract is unsupported by the plain meaning of the Protection Period, the plain meaning and language of the contract as it relates to the payment of commissions for lease renewals and rewrites the agreement knowingly entered into by the parties.

**C. Commissions on Lease Renewals are Commonly Negotiated and Paid by Landlords/Sellers to Brokers.**

Brokers and sellers of property frequently negotiate for the payment of commissions for lease renewals in listing agreements. Amicus Brief, The Perpetuity Argument paragraph, p 8-9. The purpose of a commission for lease renewals is two-fold: first, it rewards the broker a fixed percentage of the economic benefit provided to the seller through the continued leasing of its premises by the tenant provided by the broker; and second, it protects the broker from possible fraud by the seller and/or the buyer. For

example, if no lease renewal clause existed, the seller and buyer could purposely negotiate and sign a short initial lease containing numerous options to renew and thus limit the amount of the commission payable to the broker on the initial lease. In this Listing Agreement the negotiation resulted in a contract term providing for a commission “of six percent (6%) on any and all lease renewals at the time of such renewals.” This lease renewal provision cannot be any clearer. Zions must pay Heal a commission for “any and all” lease renewals regardless of when renewed.

In *Amerus Property Brokers v. Hicklin*, 585 N.W.2d 245 (Iowa 1998), a listing agreement provided for a five percent commission for the initial lease and “negotiated renewals.” After the conclusion of the initial lease term the tenant and landlord, without the assistance of the broker entered into a second lease for a three-year term. *Amerus Property Brokers v. Hicklin* 585 N.W.2d 245, 247 (Iowa 1998). The broker learned of the second lease and demanded a commission based on the terms in the listing agreement. The Iowa Supreme Court concluded that commissions were due to the broker because the landlord was benefitting from the work done by the broker and “must be held to the bargain it memorialized in the listing agreement.” *Id.* at 249. Similarly, Zions benefitted from the work done by Heal and must also “be held to the bargain it memorialized in the listing agreement.” Zions is therefore liable to Heal for a commission of 6% on the Lease Renewal. Thus, this Court should overturn the district court’s interpretation of the contract and order Zions to pay Heal the commission for the Lease Renewal.

**II. If this Court Reverses the District Court's Holding, Heal is Entitled to an Award of Attorney Fees for Services Rendered Before the District Court and Before this Court.**

In the event that the Appellate Court reverses the district court's decision related to liability under the contract for lease renewals, two grounds support an award to Heal of the attorneys' fees and costs it has incurred in prosecuting the complaint and this appeal. First, the Listing Agreement provides for the recovery of fees by the prevailing party. Second, caselaw clearly indicates that a prevailing party on appeal can recover its fees and costs from the district court action and from prosecuting the appeal.

**A. Attorneys' Fees Are Available Under the Listing Agreement.**

The basis for Heal's claim for attorneys' fees is the Listing Agreement between Zions and Heal. Paragraph 7 of the Listing Agreement provides that the prevailing party in a lawsuit shall be entitled to an award of attorneys' fees to prosecute or defend any rights under the contract. Listing Agreement Paragraph 7.

**B. A Provision for Payment of Attorneys' Fees in a Contract Includes Attorneys' Fees Incurred by a Prevailing Party on Appeal as Well as at Trial.**

The rule in Utah has long been that where a contract provides for attorneys' fees to the prevailing party, said fees include attorneys' fees incurred at the district court level and incurred on appeal. See *Management Services Corp. v. Development Associates*, 617 P.2d 406, 409 (Utah 1980)(overruling *Swain v. Salt Lake Real Estate & Investment Co.*, 3

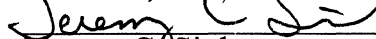
Utah 2d 121, 279 P.2d 709(Utah 1955)). The district court's granting of attorneys' fees to a party is a question of law reviewed for correctness. *Keith Jorgensen's, Inc. v. Ogden City Mall Co.*, 26 P.3d 872, 876 (Utah App.2001)(citing *Dejavue, Inc. v. U.S. Energy Corp.*, 993 P.2d 222). In the event that Zions does not prevail on appeal, the award of attorneys' fees to Zions by the district court must be reversed. Heal would become the prevailing party and would be entitled to its attorneys' fees. In the event this Court overturns the district court on all aspects yet does not award Heal its fees pursuant to the Listing Agreement and Utah Rules of Appellate Procedure Rule 34(a) then this Court should remand the issue of Heal's fees to the district court to determine Heal's reasonable attorneys' fees incurred during the prosecution of the district court action and appeal.

### III. CONCLUSION

Because the district court's interpretation of the Listing Agreement: 1) ignores the plain meaning of the contract; 2) ignores the industry wide purpose of a protection period; and 3) rewrites the agreement as negotiated between two equally competent parties, the district court's interpretation of the contract should be reversed and the commission for the Lease Renewal should be paid to Heal. Furthermore, Heal is entitled to its reasonable attorneys' fees and costs incurred before the district court and the appellate court. Thus, this Court should reverse the district court's interpretation of the Listing Agreement, disallow Zions' attorneys' fees and costs and remand this action to the district court for the sole purpose of determining Heal's reasonable costs and fees incurred before the district and appellate courts.

Dated this 29<sup>th</sup> day of September, 2004.

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### ADDENDUM

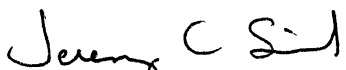
Pursuant to Utah Rules of Appellate Procedure Rule 24(a)(11) no addendum is necessary because this appeal turns on the interpretation of a contract and not on any constitutional provision, statute, rule or regulation.

### CERTIFICATE OF SERVICE

I, Jeremy C. Sink, certify that on September 29, 2004, true and correct copies of the foregoing BRIEF OF THE APPELLANT were filed with the Utah Court of Appeals and served via first-class mail, postage prepaid, to Appellee's counsel, Steven F. Allred, at the following address:

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